No. 9007

In the United States Circuit Court of Appeals for the Ninth Circuit

BETTY ROGERS, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

AND

BETTY ROGERS, O. N. BEASLEY, OSCAR LAWLER, JAMES K. BLAKE, EXECUTORS OF THE ESTATE OF WILL ROGERS, DECEASED, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

UPON PETITIONS TO REVIEW DECISIONS OF THE UNITED STATES BOARD OF TAX APPEALS

BRIEF FOR THE RESPONDENT

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CITATIONS

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OPINION BELOW

The only previous opinion in these cases is that of the United States Board of Tax Appeals (R. 31–45), which is reported in 37 B. T. A. 897.

JURISDICTION

The petitions for review herein involve the individual and estate income tax liabilities of the petitioners in the amounts of $17,055.90 (R. 11–17, 32, 46, 49), and $16,894.61 (R. 24–30, 32, 46–47, 58), respectively, for the taxable year 1933, and are taken from decisions of the Board of Tax Appeals entered May 19, 1938 (R. 46–47). The cases are brought to this Court by petitions for review [1] filed August 13, 1938 (R. 47–55, 56–64), pursuant to the provisions of Sections 1001–1003 of the Revenue Act of 1926, c. 27, 44 Stat. 9, as amended by Section 1101 of the Revenue Act of 1932, c. 209, 47 Stat. 169, and by Section 519 of the Revenue Act of 1934, c. 277, 48 Stat. 680.

QUESTION PRESENTED

Whether the marital community loss sustained by petitioners in the taxable year was a statutory capital net loss or an ordinary loss within the meaning of the statute.

STATUTE INVOLVED

Revenue Act of 1932, c. 209, 47 Stat. 169:

> SEC. 23. DEDUCTIONS FROM GROSS INCOME.
>
> In computing net income there shall be allowed as deductions:
>
> *   *   *   *   *
>
> (e) *Losses by individuals.*—Subject to the limitations provided in subsection (r) of this

[1] Both cases involve the same question and were consolidated for hearing and opinion before the Board (R. 32–33, 65) upon motion of petitioners, concurred in by counsel for the respondent. This Court entered an order consolidating the causes for briefing, hearing and decision upon a single, consolidated transcript of record. (R. 89–90.)

section, in the case of an individual, losses sustained during the taxable year and not compensated for by insurance or otherwise—

* * * * *

(2) if incurred in any transaction entered into for profit, though not connected with the trade or business. * * *

SEC. 101. CAPITAL NET GAINS AND LOSSES.

* * * * *

(b) *Tax in case of capital net loss.*—In the case of any taxpayer, other than a corporation, who for any taxable year sustains a capital net loss (as hereinafter defined in this section), there shall be levied, collected, and paid, in lieu of all other taxes imposed by this title, a tax determined as follows: a partial tax shall first be computed upon the basis of the ordinary net income at the rates and in the manner as if this section had not been enacted, and the total tax shall be this amount minus 12½ per centum of the capital net loss; but in no case shall the tax of a taxpayer who has sustained a capital net loss be less than the tax computed without regard to the provisions of this section.

(c) *Definitions.*—For the purposes of this title—

* * * * *

(2) "Capital loss" means deductible loss resulting from the sale or exchange of capital assets.

* * * * *

(6) "Capital net loss" means the excess of the sum of the capital losses plus the

capital deductions over the total amount of capital gain.

*　　*　　*　　*　　*

(8) "Capital assets" means property held by the taxpayer for more than two years (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale in the course of his trade or business. * * *

STATEMENT

The material facts were summarized and found by the Board of Tax Appeals (R. 33–35), pursuant to stipulations entered into between the parties (R. 66–71, 83–85), as follows:

The petitioner, Betty Rogers, a resident of California, is the widow of Will Rogers, who died testate, a resident of California, on August 15, 1935. She and the other petitioners were appointed executors of the estate of the decedent by the Superior Court of the State of California in and for the County of Los Angeles, on September 17, 1935. (R. 33.)

During September, 1927, the decedent and his wife purchased for profit certain business real estate situated in the county of Los Angeles, California, at a price of $105,000, payable as follows: $15,000 cash at the time of purchase, the assumption of a note in the amount of $52,000, which was secured by a mortgage on such property and became due and payable in 1930, and the giving of their promissory note for the balance of $38,000, secured by a trust deed on the property. (R. 33.)

The decedent and his wife paid the $15,000 cash and prior to 1933 paid in full the $52,000 note. (R. 33.)

The note for $38,000 and the beneficial interest under the deed of trust which secured it were transferred and assigned to the California Trust Company, a corporation. The note became due and payable on August 19, 1932. (R. 33.)

On August 25, 1932, payment of the note and accrued interest thereon was demanded of decedent and his wife and notice was given that, unless the principal and interest were paid, the holder of such note would proceed to enforce its rights under the provisions of the deed of trust given to secure payment of it. (R. 33–34.)

Thereafter it was agreed by and between decedent and his wife and the holder of the $38,000 note and trust deed that the property be conveyed by the former to the latter and that the note be canceled and surrendered. Thereafer the property was reconveyed by the Title Guarantee & Trust Company to the decedent and his wife and on April 21, 1933, they transferred and conveyed it to the California Trust Company, and the $38,000 note was surrendered to decedent and his wife and canceled. (R. 34.)

In addition to the $67,000 paid by the decedent and his wife upon the purchase price of the property they also paid, prior to April 21, 1933, escrow expenses in the amount of $212.02, or a total of $67,212.02. For the years 1927 to 1932, inclusive, they were allowed depreciation on the improvements on the property in the total amount of $13,156.77. Their total unrecovered cash investment in such property at the time of its conveyance to the California Trust Company was $54,055.25. The decedent and his wife each sustained a loss in 1933 from the transaction in the amount of $27,027.62. (R. 34.)

The decedent and his wife filed separate returns for 1933. They computed a loss on the transaction in the amount of $57,643.46 and each deducted one-half of that sum, or $28,821.73, as an ordinary loss, under the provisions of Section 23 (e) of the Revenue Act of 1932. The respondent reduced the amount of the loss to $54,055.25, and, in recomputing the tax liability of each of them, treated the loss as a capital loss within the meaning of Section 101 of the Revenue Act of 1932. The deficiencies result from respondent's determination that the loss was a capital loss. (R. 34–35.)

Upon the basis of the foregoing facts, the Board affirmed the Commissioner's determination that the loss sustained by petitioners was a capital loss (R. 45), and entered its decisions accordingly (R. 46–47). From the decisions so entered, the taxpayers petitioned this Court for review. (R. 47, 56.)

SUMMARY OF ARGUMENT

The marital community loss sustained by petitioners was clearly a statutory capital loss and not an ordinary one under the statute. The statute defines "capital assets" as property held by a taxpayer for more than two years. Petitioners purchased the property herein in 1927 and it was deeded to them subject to encumbrances. It is not necessary that a taxpayer own property outright in order to come within the purview of the statute since it is required merely that property be "held" for more than two years. Petitioners conveyed the property in 1933 by Grant Deed which of course implies a sale. Moreover, they do not contend that they did not own the property or that it was not a capital asset within the meaning of the statute. It is therefore not clear how the property, being a statutory capital asset, could have been disposed of at a loss without a statutory capital loss resulting.

Petitioners contend that it was not a capital loss because it did not result "from the sale or exchange of capital assets," as required by the terms of the statute and that the transaction constituted merely the satisfaction and payment of an existing debt for the reason that they received nothing in exchangeable value in return and had nothing in the end which they did not have in the beginning, except a $54,000 loss. This argument is untenable, however,

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since the deed of conveyance shows that they received as consideration $10 in cash and cancellation and surrender of their outstanding $38,000 note, and "that the consideration received by grantors (petitioners) is equal to the fair value of grantors' interest in said land." This in itself concedes a valuable consideration. If they had received nothing in exchangeable value in return, their loss would have been almost twice as large as they claimed. It is settled that release from liability is a valuable consideration. Moreover, if they had conveyed the property for $38,000 cash and used the money to pay the note, they would have unquestionably made a sale and the situation was not changed when they handled the transaction as they did. From the foregoing it is apparent that we have all the essential elements of a valid sale. It follows that the loss, suffered upon the sale or exchange of a capital asset held by petitioners for more than two years, is a statutory capital loss deductible only as such.

Even if the transaction be treated as an exchange instead of a sale, the same result follows since there is no substantial difference between a sale and an exchange. In either case title to the property is absolutely transferred and the same rules of law apply to the transaction.

The cases relied upon by petitioners are distinguishable or have no application to the facts herein since, as petitioners state, the issue involved is one which has never been passed upon by the courts, or by the Board except in the instant cases.

ARGUMENT

The marital community loss sustained by petitioners upon the disposition of their real property in the taxable year is a statutory capital loss, and not an ordinary loss, within the meaning of the statute

The respondent determined that the transaction whereby petitioners transferred the property in 1933, full title to which they had acquired in 1927, in consideration for the cancellation of their outstanding note given in payment thereof, amounted to an exchange of one asset for another—real estate for a trust deed note—and that therefore the loss suffered on the disposition of the property is a capital loss under the provisions of Section 101 of the Revenue Act of 1932, *supra*. (R. 16–17, 29, 32.)

The Board held that the property was deeded to petitioners subject to the indebtedness which they assumed and paid, and therefore it is a statutory capital asset acquired in a transaction entered into for profit, and was held by the taxpayers for more than two years (R. 36); that upon transfer of the property to their creditor, petitioners not only paid a debt—which of itself does not entitle them to a loss deduction—but also were released from their promise to pay the $38,000 note (hereinafter called the note) (R. 38); that therefore, under the authorities, their disposal of the property constituted either a sale or an exchange—preferably a sale—of all their right, title and interest in the property for the price of their obligation (R. 39); that no mere compromise of a note is involved for the reason that if petitioners had transferred the property for $38,000 cash and had paid the note therewith, they would have made a sale of the property (R. 42); and that, accordingly, the respondent's determination that they sustained a capital loss is correct (R. 45).

Petitioners contend that the loss suffered was not a statutory capital loss since it did not result "from the sale or exchange of capital assets", and that in the end, they had nothing they did not have in the beginning but were concededly out of pocket to the extent of approximately $54,000 (Br. 11–13); that giving the ordinary meaning to the language of the statute, an ordinary loss, as distinguished from a capital loss, was sustained herein for the reason that the transaction constituted merely the satisfaction and payment of a debt existing between two persons standing in the position of debtor and creditor and, under the authorities, payment of a debt does not constitute a sale or an exchange of property (Br. 14–17); that at the culmination of the transaction, petitioners had lost approximately $54,000 in money paid out but had received nothing of exchangeable value in return with the result that there was no sale or exchange of the property (Br. 17–18); and that the Board's decisions herein are inconsistent with and contrary to its other decisions wherein taxpayers lost their property through foreclosure proceedings or in similar transactions (Br. 19).

It is our position that the property, deeded to petitioners in 1927 subject to the indebtedness which they assumed and later paid, was thereafter actually owned by them subject to the encumbrances, of course; that the transfer of the property to the creditor in 1933 was a transaction constituting either a sale or an exchange of all their right, title and interest in the property in consideration for cash and the amount of their outstanding note obligation; and that therefore the loss suffered upon disposal of the property, which had been held by petitioners for more than two years, constituted a statutory capital loss within the meaning of Section 101 (c) (2), (6) and (8) of the Revenue Act of 1932, *supra.*

The amount or deductibility of the loss is not in issue. (Br. 11.) The sole question is whether the loss should be treated as ordinary or capital. We submit that under the facts herein it is clearly a statutory capital loss and deductible only as such. This is true for the reasons that the property was deeded to petitioners in 1927 for $105,000; they paid approximately $67,000 toward the purchase price before disposing of it in 1933; they claimed and were allowed as deductions on their tax returns approximately $13,000 depreciation of improvements on the property during their six years of tenure; they held it for more than two years, whereupon it became a statutory "capital asset" (Section 101 (c) (8), Revenue Act of 1932, *supra*); and they sold it in 1932 at a loss, having conveyed all their right, title and interest therein for the consideration of cash and the note obligation outstanding against it, which necessarily resulted in a statutory "capital loss" (Section 101 (c) (2), Revenue Act of 1932, *supra*).

The statute defines "capital assets" as property held by taxpayers for more than two years. Section 101 (c) (8), Revenue Act of 1932, *supra*. The Board held that the real estate in question was "held" by petitioners for more than two years, within the purview of the statute. (R. 36.) If petitioners purchased the property, it follows that they must have been the real owners. The stipulated facts show that they *purchased* it in 1927. (R. 33, 67.) Petitioners themselves state that they "purchased [the] real property", and that "This property was acquired by Will Rogers and his wife * * * as community property." (Br. 4–5.) "The property was deeded to them subject to the indebtedness which they assumed and paid." (R. 36.) Therefore they actually owned it even though they did not have clear, unencumbered title. Although they conveyed it in trust to secure payment of the note (R. 33, 68), this, of course, did not divest them of equitable title. Moreover, the application of the capital loss provisions of the statute do not depend upon whether a taxpayer owns the property outright or has merely an equity or contract right in it, since it defines "capital assets" as property merely "held" by the taxpayer for more than two years. Any contrary interpretation would lead to absurd results such as, for example, where a mortgagor and mortgagee of property could each claim that they "held" less than the absolute title, and consequently that it did not constitute "capital assets" even though held for the statutory period of two years.

Moreover, whatever may be said of the character of their disposition of the property, the fact remains that petitioners voluntarily conveyed it to others in 1933 by "Grant Deed." (R. 81–82.) This implies a sale. Nowhere in their brief do they contend or suggest that they did not own the property from 1927 to 1933, or that it did not constitute capital assets within the meaning of the statute. Rather they admit (Br. 4–5) that they "purchased" and "acquired" it as community property in 1927. Therefore, it is not at all clear and petitioners do not explain how the property, constituting statutory capital assets because it was held by them for more than two years, could have been conveyed to others, at a loss without the loss having been a capital loss which, under the statute, "means deductible loss resulting from the sale or exchange of capital assets" (Section 101 (c) (2), *supra*). If the property was a statutory capital asset—and this is not denied— conveyed by deed to another at a loss, therefore, it follows that the loss must necessarily be a capital loss under the provisions of the statute.

Petitioners contend, however, that the loss was not a "capital loss" for the reason that it did not result "from the sale or exchange of capital assets," as required by the terms of the statute (Section 101 (c) (2), *supra*); that, in the end, they had nothing more than they had in the beginning except a $54,000 loss (Br. 11–13); and that the transaction was therefore merely the satisfaction and payment of an existing debt (Br. 14–17) upon the culmination of which they received nothing of exchangeable value in return (Br. 17–18). If, therefore, they sold or exchanged the property and received something of exchangeable value in return, their argument necessarily falls. We submit that, under the facts herein, the transaction was clearly either a sale or an exchange upon the consummation of which they received adequate value in exchange.

Petitioners, in addition to admitting that they purchased and acquired the real estate as community property (Br. 4–5), also admit that "on April 21, 1933, they conveyed the property to the California Trust Company and the note in the amount of $38,000.00 was surrendered and cancelled," and they make reference to "the deed by which the conveyance was made * * *." (Br. 5.) They characterize this as a satisfaction and payment of the indebtedness existing between themselves and the transferee of the property, and not a sale or exchange (Br. 16) even though they purchased and had title to the property, as heretofore shown. The deed (R. 81–82), however, clearly shows that they conveyed the property to the holder of the note in consideration of $10 and for the full satisfaction, cancellation and surrender of the note, and "that the consideration received by grantors is equal to the fair value of grantors interest in said land." This, in itself, concedes an adequate and valuable consideration. Contrary to petitioners' contention (Br. 17–18), therefore, this negatives the argument that they received nothing of exchangeable value in return in the transaction. (Apparently the value of the property had depreciated upon the inception of the depression, although this is not shown by the record). If, as petitioners contend (Br. 17–18), they received no consideration or exchangeable value in return, their loss would have been $92,055.25 (cost of the property less depreciation allowed) instead of only the claimed amount of $54,055.25, as the Board observed (R. 38). Moreover, their release from liability through the surrender and cancellation of the note was a valuable consideration for the sale. *Ferguson* v. *Larsen,* 139 Cal. App. 133, 33 Pac. (2d) 1061; *Merchants State Bank* v. *Chicago, B. & Q. R. Co.,* 245 Ill. App. 211; *Bradley & Co.* v. *Klingman Implement Co.,* 79 Nebr. 144; *Rachman* v. *Clapp,* 50 Nebr. 648; *Billings* v. *Warren,* 21 Tex. Civ. App. 77. There was, therefore, a contract upon a valuable consideration between two or more persons for the transfer of property (cf. *Radebaugh* v. *Scanlan,* 41 Ind. App. 109) which, under the ordinary meaning of the words of the statute, constitutes a valid sale. Moreover, it is clear, as the Board points out (R. 42), that if petitioners had conveyed the property for $38,000 cash and paid the note with the money, they would thereby clearly have made a sale, and the situation is not changed where they conveyed their property directly to the creditor in satisfaction of their indebtedness. Cf. *United States* v. *Hendler,* 303 U. S. 564.

From the foregoing it cannot be gainsaid that we have all the elements of a valid sale—mutual agreement, competent parties, a valuable money consideration, and a transfer of title. *Iowa* v. *McFarland,* 110 U. S. 471, 478; *United States* v. *Benedict,* 280 Fed. 76, 80 (C. C. A. 2d); *Popp* v. *Munger,* 131 Okla. 282, 268 Pac. 1100, 1102; *City of Cannelton* v. *Collins,* 172 Ind. 193; *Gallus* v. *Elmer,* 193 Mass. 106; *Howard* v. *Harris,* 8 Allen (Mass.) 297, 299. It follows that the loss, suffered upon the sale or exchange of capital assets held by petitioners for more than two years, is necessarily a statutory capital loss and deductible only as such.

Moreover, there is no substantial difference between a sale and an exchange in that in either case title to the property is absolutely transferred and the same rules of law apply to the transaction whether the consideration upon the contract is money or by way of barter. *Hale* v. *Helvering,* 85

F. (2d) 819 (App. D. C.). Therefore the provisions of the statute are equally applicable in the event of a "sale or exchange of capital assets." Section 101 (c) (2), *supra.*

Finally, if the transaction constituted merely satisfaction and payment of their existing debt, as petitioners contend (Br. 16), that would in nowise entitle them to a deduction for the loss, either ordinary or capital, as the Board pointed out (R. 38). What they are claiming is a loss realized upon the disposition of property, admitted to be a statutory capital asset, and since the assets were sold or exchanged for a valuable consideration, the resulting loss may be deducted only as a statutory capital loss.

The cases relied on by petitioners are distinguishable or have no application to the facts herein. Thus, *Hale* v. *Helvering, supra,* relied upon principally by petitioners (Br. 14–16), is distinguished by the Board (R. 40–42). There, the taxpayer sold real property in 1925 for $60,000, transferred full title to the purchaser upon the payment of $20,000 cash and $40,000 in notes secured by first mortgage, reported the profit in his 1925 tax return, and paid the tax thereon. At maturity of the notes in 1927, the maker, although financially able, refused to pay, whereupon suit was instituted in 1929, but before judgment, a settlement was agreed upon in that year which resulted in a loss to the taxpayer of approximately $7,500. The Commissioner determined that it was not a capital loss, contending before the Board that it was allowable only as a bad debt deduction. The court held that it was not a capital loss for the reason that it did not result from a sale or exchange, stating (p. 822):

> the compromise with the maker, who was able to pay them, of promissory notes, for less than their face value, does not constitute a sale or exchange of capital assets entitling the taxpayer to a capital loss.

Thus, in that case, the taxpayer sold the property only later, after institution of suit, to compromise the sum still due on the notes at a greatly reduced amount. Apparently, it was in the nature of a consideration for settlement of the suit. The compromise of liability on a note is not a sale of the note, but that is not the situation herein. The court there held, therefore, that such a transaction was neither a sale nor an exchange, but merely the extinguishment of the liability on the notes. That is quite different from the situation in the instant cases, wherein the property was actually and voluntarily sold and conveyed to a third party for a valuable consideration (cancellation of the note) "equal to the fair value of grantors interest in said land." (R. 82.) In the former, there was a compromise of the contested obligation under the notes; in the latter, a voluntary sale or exchange of the property for a note at a loss, for the apparent reason that the property in question, purchased in 1927 during the time of higher prices, was sold after it had decreased in value.

Upon analysis, therefore, it does not seem so incredible, as stated by petitioners (Br. 15–16), that the loss suffered by the mortgagee, pursuant to a compromise under the peculiar facts in that case, should not be treated as a capital loss, whereas the loss suffered by the mortgagors in the present cases, pursuant to a voluntary sale or exchange for a valuable consideration, should be considered a capital loss. It is apparent that a compromise settlement between debtor and creditor, where the notes are merely paid off at less than the amount of the obligation, does not constitute a sale or exchange resulting in a "capital loss," as was held in the *Hale* case, any more than does the satisfaction and payment of a debt, under similar circumstances, between debtor and creditor, as stated by petitioners (Br. 16), or than does the payment at maturity of the face value of bonds purchased at a premium, as pointed out by the court in the *Hale* case, citing *Watson* v. *Commissioner,* 27 B. T. A. 463, also relied upon by petitioners (Br. 16).

Likewise, in *United States* v. *Fairbanks,* 95 F. (2d) 794 (C. C. A. 9th), relied on by petitioners (Br. 16), this Court, citing *Watson* v. *Commissioner, supra,* held that the redemption of bonds or other obligations—the mere payment thereof according to their terms—admittedly statutory capital assets, is in nowise a sale or exchange, and therefore could not result in capital gain or loss. The same is true, of course, of the increment realized upon the surrender of insurance and annuity policies. *Hellman* v. *Commissioner,* 33 B. T. A. 901. Cf. also, *Braun* v. *Commissioner,* 29 B. T. A. 1161; *Brown* v. *Commissioner,* 36 B. T. A. 178, and *Felin* v. *Kyle,* 22 F. Supp. 556 (E. D. Pa.), all of which are relied upon by petitioners (Br. 16–17), and none of which involves a sale or exchange, and therefore obviously can have no bearing on the question in the instant cases.

In *Dallas T. & T. Warehouse Co.* v. *Commissioner,* 70 F. (2d) 95 (C. C. A. 5th), the insolvent taxpayer in 1928, owing its lessor approximately $108,000 on a warehouse it had leased for 20 years at $7,000 per month, conveyed certain property in which it had an equity of approximately $17,000 to the lessor who later cancelled the balance of the debt, charging it off as worthless. The court there held that the taxpayer realized no gain or profit since it received nothing of exchangeable value in return, whereas in the instant cases, petitioners admittedly received a consideration equal to the fair value of their interest in the property sold. (R. 82.)

In *Commonwealth, Inc.* v. *Commissioner,* 36 B. T. A. 850, relied upon by petitioners as inconsistent with the instant decisions (Br. 19), the owner of the real property, subject to a mortgage, deeded the property to the mortgagee, *without consideration,* and thereby sustained a loss held to have been ordinary and not capital. No comment thereon is necessary further than that there, as the Board points out (R. 43–44), there was no consideration for the transfer of the title to the mortgagee and consequently no sale or exchange, whereas herein petitioners received a consideration of $10 cash and "full satisfaction of all obligations [the $38,000 note] secured by the deed of trust."

In *Hammel* v. *Commissioner*, 36 B. T. A. 1331 (memorandum opinion), *Rust* v. *Commissioner*, 38 B. T. A., No. 115, and *Warfield* v. *Commissioner*, 38 B. T. A., No. 114, also stated by petitioners to be similarly inconsistent with the instant decisions (Br. 19–20), the taxpayers were the mortgagors of property which was foreclosed and sold, and the Board held that the losses suffered were ordinary as distinguished from capital. In none of those cases, however, can it be said that an enforced sale, upon foreclosure proceedings resulting in an involuntary loss, is in anywise like or comparable with the voluntary sale or exchange herein for a consideration equal in value to the taxpayers' interest in the property sold. Those cases, unlike the instant cases, involved involuntary conveyances without a valuable consideration flowing to the taxpayers, the mortgagors, and are more in line with the *Commonwealth, Inc. case*, *supra*, wherein the property was conveyed without consideration. Petitioners, rather than submit to foreclosure proceedings, voluntarily sold their property (apparently greatly depreciated in value since purchased) at a loss for a consideration admittedly only equivalent in value to the fair value of their outstanding note.

Thus, it is apparent that the Board's decisions in the instant cases are not in conflict with any of its prior decisions and, as petitioners state (Br. 11), the issue involved herein is one which has never been passed upon by the courts, or by the Board except in the instant decisions. Moreover, from the foregoing it is apparent that petitioners are in error in stating (Br. 11) that the underlying principle, disclosed by the facts herein, has been so decided.

In view of the foregoing, it is submitted that the marital community loss sustained by petitioners upon the sale or exchange of their property in the taxable year is a statutory capital loss, and not an ordinary loss, within the meaning of the pertinent provisions of the statute.

CONCLUSION

The decisions of the Board of Tax Appeals are correct and in accordance with law, and should therefore be affirmed.

Respectfully submitted.

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